DATE ISSUED: December 30, 1998

CASE No.: 96-ARN-4

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR,

Complainant,

v.

ATLANTIC CITY HOSPITALITY CARE, INC., d/b/a KING DAVID CARE CENTER OF ATLANTIC CITY,

Respondent.

Appearances:

Diane Wade, Esq.
Counsel for Employment Standards, Office of the Solicitor,
U.S. Department of Labor, New York, New York
For the Complainant

Michael A. Kaufman, Esq.
Kaufman, Naness, Schneider & Rosensweig, P.C.
Jericho, New York
For the Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This proceeding arises out of a determination issued by the Administrator, Wage and Hour Division, Employment Standards Administration (hereafter "Complainant" or "Administrator") under the enforcement provisions of the Immigration and Nationality Act (specifically, the Immigration Nursing Relief Act of 1989), 8 U.S.C. § 1101 ***et seq***. Implementing regulations appear at 20 C.F.R. Part 655, Subparts D and E (and

previously also appeared at 29 C.F.R. Part 504). The instant case relates to nonimmigrant nurses from the Philippines entering the United States on H-1A visas to perform work at the facilities of Respondent Atlantic City Hospitality Care, Inc., doing business as King David Care Center of Atlantic City (hereafter "King David" or Respondent), in Atlantic City, New Jersey.

A hearing in this matter was held on October 23, 24, and 25 and on November 20 and 21, 1996, in Atlantic City, New Jersey. The record was essentially complete when the hearing terminated at the end of 1996, as only one witness remained to be heard. Before it could be decided whether the parties wished to proceed without the testimony of the final witness, King David closed its operations as a result of involuntary bankruptcy. This matter dragged on for more than an additional year while the Trustee in Bankruptcy considered appropriate action. In view of the apparent number of creditors, it was unclear that there would be a significant recovery even if the Administrator were to prevail completely. Consequently, the parties decided to proceed on the record before me, and I ordered the record closed by my Order of June 16, 1998. Counsel for the Trustee declined to submit any briefing and, following a grant of additional time, the Administrator submitted Proposed Findings of Fact and Conclusions of Law on October 30, 1998. The case is now ready for disposition.

PROCEDURAL BACKGROUND

On April 2, 1996, by certified mail, in accordance with 20 C.F.R. § 655.415(b), the Regional Administrator of the Wage and Hour Division filed with the Chief Administrative Law Judge a copy of the complaint that led to the investigation of King David and the written determination served upon King David at the close of its investigation. It was requested, in accordance with 20 C.F.R. § 655.400(g) and 655.415(a), that the individual complainant's identity remain confidential until such time as that complainant elected party status.[1] The Administrator's determination was based upon King David's alleged misrepresentation of material facts and failure to perform the conditions to which it attested, in view of its failure to pay the required wage rate to both United States and nonimmigrant alien registered nurses and its failure to provide adequate support services to free registered nurses from administrative and other non-nursing duties. The Administrator assessed the following penalties: back wages of $477,145.78 owed to 60 U.S. and H-1A nurses and a civil money penalty in the amount of $63,000 ($60,000 of which was based upon the failure to pay the prevailing wage rate [Second Attestation Element 2 - Step 1] and $3,000 of which was based upon the failure to provide adequate support [Fourth Attestation Element - Step 4].)

[1] The individual complainant never sought party status, and as used herein, "Complainant" refers to the Administrator of the Wage and Hour Division.

King David, through counsel, requested a hearing on April 11, 1996, via Federal Express. In its hearing request, King David denied that it owed the back wages claimed or that it had failed to provide adequate support services. In support, King David noted that the H-1A nurses came from the Philippines designated as graduate nurses ("GN") and were granted temporary or interim licenses that permitted them to engage in the practice of professional nursing as registered nurses ("RNs") immediately upon admission, provided that they took the standardized state-wide test within 60 days. However, those H-1A nurses who failed the test were prevented from performing RN functions. Thus, King David demoted them to the position of certified nurses aides ("CNAs") and paid them in accordance with the collective bargaining wages for that position until such time as they passed the RN test. King David further noted that there was no basis for providing them with support to free them to perform RN duties as they were not permitted to perform such duties.

In accordance with the strict statutory deadlines under the Immigration and Nationality Act, I noticed a hearing for May 24, 1996, in Atlantic City, New Jersey. ***See*** 8 U.S.C. § 1101 ***et seq.***; 20 C.F.R. § 655.435(c). Following a conference call held on May 9, 1996, the parties jointly moved for a continuance and agreed to waive all statutory and regulatory deadlines and I found compelling circumstances for them to do so. Thereafter, the hearing was scheduled for, and conducted on, October 23, 24, and 25, 1996, continuing to November 20, 21, and 22 (although proceedings were only held on November 20 and 21).[2]

At the hearing, Complainant's Exhibits 1 through 13, Respondent's Exhibits 1 through 6, and Joint Exhibits 1[3] and 2 were admitted into evidence. The following witnesses testified: Nanette P. Samillano (nurse) (Tr. 20-93); Margaret Howard (New Jersey Board of Nursing field representative) (Tr. 94-133); William Devins (Wage and Hour Division compliance specialist) (Tr. 132-161); Rosemarie Naval (nurse) (Tr. 162-200); Angelito D. Ocampo (nurse) (Tr. 206-280); Mary Pat Dodds (Wage and Hour Division special program coordinator) (Tr. 285-354, 359-521); Ruth Tayao (King David director of nursing services) (Tr. 541-636); and Leticia Chang (King David director of in-

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[2] In this Decision and Order, the following abbreviations will be used: "CX" followed by the number refers to Complainant's Exhibits, "RX" refers to Respondent's Exhibits, and "JX" refers to joint exhibits. Subparts of CX 1 will be referenced by the pertinent number or description (***e.g.,*** subpart M will be referenced as "CX 1-M"). References to the transcript of the hearing conducted in October and November 1996 appear as "Tr." followed by the page number.

[3] Joint Exhibit 1 consists of the Petition for a Nonimmigrant Worker, the letter from Renee Blackwell (King David's director of human resources) concerning qualifications, and the notice of action form relating to Eloisa Alfaro-Cabrera. The parties stipulated that these three documents were submitted to the Immigration and Naturalization Service and received from it for every H-1A nurse involved in this action. (Tr. 530-531).

service training and education) (Tr. 637-671). Following Ms. Chang's testimony, Respondent rested. (Tr. 672). However, counsel for Complainant indicated that Complainant wished to call Ms. Leonora Dwyer (also known as "Pilao-Dwyer"), the Administrator for King David, as a final witness, and I agreed that she would be required to appear (Tr. 681-686, 689-697). Prior to the Ms. Dwyer's testimony, I ordered counsel for the Complainant Wage and Hour Division to provide counsel for the Respondent with the documents that were to be used in connection with her cross examination. (Tr. 697-698). Among the documents provided to counsel for the Respondent in connection with Ms. Dwyer's examination was one referring to a Government investigation being conducted, and Counsel for Respondent advised that further investigation and consultation would be required before counsel would be able to decide how to proceed. (Tr. 704-712). Accordingly, I terminated the proceedings and directed the parties to attempt to reach a stipulation concerning what the testimony would show or to otherwise agree upon and recommend a possible course of action. (Tr. 716-718).

A conference call was held before the undersigned administrative law judge and the parties on March 12, 1997, with attorneys Diane Wade and Michael Kaufman, who represented the parties at the hearing, appearing, and Ms. Mary Dodds also participating on behalf of the Department of Labor. At that time, the parties advised that the creditors for King David had filed for involuntary bankruptcy and that King David was losing its lease and would be closing its doors. Counsel for Respondent advised that Respondent's attorneys would no longer be able to act on behalf of the Respondent and would have to await action by the Bankruptcy Court.

In a subsequent conference call, held on April 3, 1997, attorneys Diane Wade, Ivan Purchez, Ted Gosch, and Michael Kaufman made an appearance and advised that a Trustee in Bankruptcy had been appointed, the proceeding had been converted to a Chapter 11 proceeding, the sale of King David's single asset was scheduled for April 10, and King David was considering submitting the entire claim involved in the instant case (consisting of $477,145.78 in back wages and $63,000.00 in civil money penalties, without interest) as an unsecured debt. A 60-day continuance was requested and granted.

By letter motion of December 1, 1997, the Complainant, through counsel, requested that the record be closed in this matter and that I render a decision on the merits. The Complainant advised that it wished to obtain an Order with which it could proceed finally before the Bankruptcy Court.

In a response dated December 9, 1997, attorney Michele Coleman Huresky, of the law firm of Spector & Ehrenworth, P.C., Florham Park, New Jersey, indicated that her firm represented Robert P. Gibbons, the Chapter 11 Trustee of Respondent ("Trustee"). The Trustee requested that I refrain from making a ruling for 60 days until it could be determined whether unsecured creditors such as the Department of Labor

would be likely to receive any recovery. The Trustee also suggested that absent briefing, a determination could not be fairly made but that the Trustee was not inclined to incur administrative expenses to retain special counsel to prepare a brief because of the magnitude of secured claims against the estate. The Trustee requested the opportunity to submit a brief in the event that unsecured creditors could expect some recovery.

In my Order of December 17, 1997, I stayed proceedings for 60 days and directed the Trustee to advise within 30 days after the expiration of the 60-day stay whether briefing was to be submitted on behalf of the Trustee and otherwise suggesting how to proceed, after which I directed the Complainant Administrator to respond within 30 days to the Trustee's suggestions. I provided that the above time periods could be extended by the stipulation of the parties or shortened on motion by any party in the event of any anticipated prejudice. The Trustee did not respond to my Order as directed or seek a further stay of proceedings. On May 11, 1998, the Complainant again moved for the record to be closed.

As noted above, by my Order of June 16, 1998 I ordered that the record in the instant case would be closed, and I further ordered that the parties should submit any briefs and/or proposed findings of fact and conclusions of law within thirty (30) days of the date of the Order, which briefing period could be extended by the stipulation of the parties. By letter of June 19, 1998, counsel for Robert P. Gibbons, Chapter 11 Trustee of Respondent, advised that "[s]ince the Trustee has determined that neither unsecured nor priority creditors shall obtain any recovery under ACHCC's [4] plan of liquidation, the Trustee will not be submitting any additional pleadings in this matter." After obtaining an enlargement of time, the Administrator timely submitted Proposed Findings of Fact and Conclusions of Law on October 30, 1998.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

Respondent King David filed "Health Care Facility Attestation (H-1A)" forms with the Labor Department's Employment Training Administration on October 5, 1992, December 23, 1993, and March 28, 1995 for the purpose of obtaining work visas for alien nurses. (CX 1-C, 1-E, and 1-G; CX 7[5]). By checking the appropriate box on those forms, King David, by the signature of its Administrator Leonora Pilao-Dwyer

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[4] The Trustee in Bankruptcy has identified Respondent as Atlantic City Hospitality Care Center, Inc., or ACHCC.

[5] CX 7 is a complete copy of the December 23, 1993 attestation form. The copy appearing as CX 1-E does not include the reverse side. (Tr. 331-338).

("Ms. Dwyer"), made specific attestations. Among other things, King David attested that (1) the employment of the aliens would not adversely affect the wages and working conditions of U.S. registered nurses similarly employed; (2) the aliens employed by King David would be paid the wage rate for U.S. registered nurses similarly employed by the facility; and (3) King David was taking steps to recruit and retain U.S. registered nurses. On the form and in explanatory information provided by Ms. Dwyer, King David indicated that one of the steps it was taking to recruit and retain U.S. registered nurses was to provide adequate support services in order to free registered nurses from administrative and other nonnursing duties. (Tr. 311, 366; CX 1-C, 1-E, and 1-G; CX 7). Subsequently, King David filed petitions with the Immigration and Naturalization Service to obtain the services of nurses under the H-1A program. (Tr. 24, 165).

Following inquiries from King David, the State of New Jersey State Employment Security Agency (SESA) made prevailing wage determinations for similarly employed nurses in the geographic area. Wage and Hour Division special program coordinator Mary Pat Dodds testified that these determinations are controlling unless the facility's rate is higher or there is a collective bargaining agreement. (Tr. 301-303). ***See*** 20 C.F.R. § 655.310(e)(1), (f). The SESA for the State of New Jersey is the Alien Labor Certification Office. In September 1992, that office advised King David (in a handwritten annotation dated "9/29/92" written at the end of the inquiry) that the average wage rate for an RN in a nursing home in Atlantic County was $15.37 per hour. Subsequently, on a Prevailing Wage Determination for H-1B [***sic***] Employment form, King David was advised again of a prevailing rate of pay for "Staff Nurse RN" of $15.37 per hour in a response dated "12/23/93" (based upon a 1991 Benefit Wage and Salary Survey from the New Jersey Assn. Non Profit Homes for the Aging). In March 1995, in a response dated "3/6/95" to a form Prevailing Wage Request from King David, the New Jersey Department of Labor indicated the prevailing rate of pay was $15.51 for RNs with up to two years of experience and $18.51 for RNs with more than two years of experience, based upon the New Jersey Hospital Association 1994 Annual Wage & Salary Survey. (CX 1-I; Tr. 295-297, 401-403, 687-689, 400-412). In the explanatory information accompanying each of the attestation forms dated October 5, 1992, December 20, 1993, and January 24, 1995, Ms. Dwyer indicated that "[t]he facility pays the prevailing wage to nurses of $15.37 per hour." (CX 1-H, 1-F, 1-D).[6]

Nanette Samillano was in the first group of twelve nurses who came to work for King David under H-1A visas on September 29, 1992. (Tr. 24). She paid almost $500 plus air fare to Ms. Dwyer's sister, Ms. Valenzuela, to get the position while still in the Philippines, and she was told that she would be paid $17 or $18 hourly and would receive health benefits, in addition to her first month's rent. (Tr. 22-23). Upon entry,

[6] The SESA wage determination accompanying the March 28, 1995 application was dated March 6, 1995, but Ms. Dwyer's statement was dated in January 1995, thus explaining her use of the prior SESA rates.

she and the others took a certified nursing aide (CNA) examination which they all passed.[7] (Tr. 27-28). When she started working at King David, she was actually paid $14 hourly as a graduate nurse (GN); she and the others received a State permit to work as graduate nurses. (Tr. 28-29). However, she failed the New Jersey registered nursing (RN) examination the first time she took it, as did two others in the initial group (Christina Perez and Beata Pagdanganan). (Tr. 36-38). At that point, the three were told that they would have to work as CNAs, and their salary was cut to a little over $6 hourly. (Tr. 38). However, they took the Licensed Practical Nurse (LPN) test, and when they all passed that test they worked as LPNs at a higher rate of pay than that of CNA. (Tr. 39). Ms. Samillano passed the RN test the next time she took it, in July 1993; the earlier one was given in February 1993. (Tr.37, 40-41). When she qualified as an RN, her salary was raised to approximately $14.50; she did not receive an increase when she became a night supervisor. (Tr. 42-43). She was transferred to unit manager on the seven to three shift. (Tr. 44). In September 1995 she was receiving "18 something dollars." (Tr. 45). Ms. Samillano testified that there was no clerical support and that as an RN, she performed other duties, such as passing trays to patients, answering the telephone, ordering office supplies, and (on night shift) cleaning up spillage. (Tr. 45-47, 67-69). However, while she was employed as a GN and an RN, she was assigned the same duties as American nurses who were GNs or RNs. (Tr. 72-23).

Angelito Ocampo, another Philippine nurse, also learned of the King David job from Ms. Valenzuela, and he paid her a $1,500 processing fee in addition to the POEA [Philippine Overseas Employment Administration] fee of 5,000 pesos ($200 to $250) and air fare. (Tr. 207). He entered the United States in April 1993 on an H-1A visa, as part of a group of 8 nurses, and he worked under a temporary work permit. (Tr. 210-214). Mr. Ocampo began working for King David on April 19, 1993. (Tr. 231). During orientation, Ms. Dwyer advised that they would be paid $10 per hour, which would be raised to $14 if they passed the state board exam for RN. (Tr. 224). He took the test in July 1993 and passed it on his first try. (Tr. 215). As a graduate nurse, he was paid $10 per hour and once he passed the licensing exam his pay increased to $14. (Tr. 215, 218). Both as a GN and as an RN, he passed out trays to patients, answered telephones, ordered non-medical and hygiene supplies, cleaned spillage, and unclogged bathrooms. (Tr. 220-223, 248-252). Mr. Ocampo indicated that there are no clerical employees at King David but there are two housekeepers per floor. (Tr. 223).

Another one of the H-1A nurses, Rosemary Naval, testified that she also learned of the job at King David from Ms. Valenzuela in the Philippines. Ms.

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[7]Job descriptions for CNA ("Nurse Aide"), LPN ("Licensed Practical Nurse"), GN ("Graduate Nurse"), and RN ("Registered Nurse") at King David appear as RX 2, RX 6, CX 1-L, and CX 1-K, respectively. (Tr. 83-92, 180-183, 187-196, 235-241, 549-555, 562-567, 640-647).

Valenzuela told her that she would be paid $10 hourly. (Tr. 162-163). She paid Ms. Valenzuela $1,500 and also paid for her air fare as well as a processing fee of $200 (5,000 pesos) to the Philippine Overseas Employment Administration (POEA). (Tr. 164). She entered the United States on December 9, 1993 under an H 1-A visa, in a group of 17 nurses. (Tr. 165). She began working for King David on December 13, 1993. During her first week, there was a meeting at which Ms. Dwyer told them that they would be paid $10 per hour until they became licensed and then they would be paid $14 per hour. (Tr. 165-166). Ms. Naval passed the RN examination the first time that she took it, in June 1994 [8] (although she could have taken it earlier, in April). Approximately one month after she passed the test, her pay was increased from $10 to $14 hourly, and two months later, she became a charge nurse. (Tr. 168-169, 172-173). As a charge nurse she was required to feed patients almost daily, answer telephones daily, order non-medical supplies weekly, and occasionally perform initial clean up in the case of accidents or spills. (Tr. 176-177, 183-184). There were no clerical employees available but there was a housekeeper responsible for disinfecting and cleaning after the initial clean ups. (Tr. 177-178). Also, CNAs were primarily responsible for patient personal care and changing beds, and if a CNA were available, the CNA would perform those duties. However, if they were short of CNAs, RNs would help. (Tr. 183-186).

Margaret Howard, a field representative for the New Jersey Board of Nursing, testified that a foreign nurse must apply for and sit for the licensing examination within 60 days of entering the country, and during that period may work as a graduate nurse. (Tr. 97-99). Prior to mid-December 1993, foreign nurses were issued temporary work permits and could work up to nine months as GNs. (Tr. 110-111). If a nurse came in to the country from mid-December 1993 until April 1, 1994, when the computer adaptive examination was started, the nurse had until April 30, 1994 to sit for the test. (Tr. 112). A GN who failed the RN examination would not be eligible to practice in New Jersey either as a GN or as an RN. (Tr. 125-127; ***see also*** Tr. 461-463).

William Devins, compliance specialist for the Wage and Hour Division, calculated a back wage summary for the employees indicating the amounts due from the period from the fourth quarter of 1992 through the third quarter of 1995, which was admitted into evidence as CX 4. (Tr. 134-136). A compilation of the raw data appears in CX 1-A and provides a listing of the wages paid to each nurse during the pertinent

[8] By waiting until June 1994 to take the test, Ms. Naval complied with neither the old requirement that she take the examination within 60 days nor the new requirement that she take it by April 30. (Tr. 604-605). See the discussion by Ms. Howard, summarized ***infra.***

period together with the amount of deficiency attributed to each such period.[9] (Tr. 157-58).

Mary Dodds is immigration coordinator for New York, New Jersey, and Puerto Rico at the Wage and Hour Division, in which capacity she reviews pending actions in the H-1B and H-1A programs, supervises investigations, and, if appropriate, determines what penalties should be assessed. (Tr. 285-288). She testified that payroll records provided by King David to the Wage and Hour Division indicate that it did not pay the full prevailing wage rate for RNs during the entire period involved. (Tr. 305). In calculating the deficiencies, the nurses were not considered as RNs (for the purpose of the higher prevailing rate based upon experience) until they were licensed as such in the United States. (Tr. 308-309). However, the date of the test rather than the date of licensing was apparently used. (Tr. 321-322).[10]

Ms. Dodds determined that "King David had misrepresented [a material fact] and failed to perform in attesting that they would pay the prevailing [wage and therefore] that the employment of H-1A nurses would have no adverse effect on employment conditions in the U.S." and she "also determined that insufficient support staff was provided by the facility to relieve the nurse[s] from performing non-nursing duties." (Tr. 311). King David's justification to Ms. Dodds was that it could not afford to pay the prevailing wage as a nursing home in a depressed area whose patients are under Medicare, and that a different prevailing wage should be used for nursing homes. (Tr. 313-314). Ms. Dodds was aware that eleven nurses failed the RN examination, all but one of which (Lilabeth Salazar) eventually passed. (Tr. 317). The Department of Labor's position is that nurses should have been paid the prevailing RN rate for the entire time period they worked at the facility, even after they failed the examination. (Tr. 315-319). However, it is also the Department of Labor's position that the nurses could have been fired and deported when they failed the RN examination, because at

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[9] For example, the schedule relating to Nanette Samillano relates to the 74 pay periods of 11/14/92 through 9/16/95 and indicates that she was paid an hourly wage of $14 from 11/14/92 through 4/3/93; $6.15 from 4/17/93 through 7/10/93; $11.25 from 7/24/93 through 9/18/93; $11.75 from 10/2/93 through 10/16/93; $14.50 from 10/30/93 through 5/14/94; $15.10 from 5/28/94 to 8/5/95; and $18.00 from 8/19/95 through 9/16/95. These amounts were compared with a prevailing wage rate of $15.37 until 4/1/95 and $18.51 thereafter, to come up with a rate differential which was used to calculate a deficiency. In Ms. Samillano's case, the back wages due were calculated as $14,419.93. (CX 1-A). Ms. Samillano took the RN test twice, passed the July 1993 examination, and received her RN license on 9/9/93. (CX 1-B).

[10] The use of the examination date instead of the certification date could possibly provide a basis for challenging the amount of back wages calculated for those RNs working after March 1995 with two years of experience, and there may be other bases for challenging the computations. However, Respondent has considered accepting the full amount assessed as an unsecured debt and has not suggested alternative methods of computation, so I will accept the Administrator's calculations as unchallenged except as discussed herein.

that point the nurses were "out of status." (Tr. 352-355, 519-520). When Ms. Dodds made her determination that the support staff at King David was inadequate and that they had failed to take timely and significant steps to relieve nurses of nonnursing duties, she did not determine whether the support services increased, decreased, or remained the same after the H-1A nurses began arriving at King David. (Tr. 351-352, 365-366). In assessing the penalties, the maximum penalty of $1,000 per violation (based upon $1,000 per nurse for the prevailing wage violations and $1,000 per attestation for the inadequate support violations) was charged. (Tr. 320, 370, 377). It was determined that there was no basis for mitigation as misrepresentation is the most serious violation, the facility had gained close to half a million dollars as a result of the violation, and sixty people were involved. (Tr. 320-321, 361-378). However, Ms. Dodds was aware that King David had had problems meeting payroll obligations and that its financial condition was "not particularly good." (Tr. 364-365).

Ruth Tayao, director of nursing services at King David, testified that the facility had a mix of patients, both young and old, with HIV-positive residents, psychiatric cases, elderly patients, and patients with unusual diseases. Some of the patients are indigent and some (who are on "skilled floors") require assistance in the activities of daily living (Tr. 543-544). She indicated that CNAs, GNs, LPNs, and RNs do their particular type of work. However, RNs help with CNAs' duties when they are short of help, and anybody walking past would be expected to clean up a spill to prevent someone getting hurt, as housekeeping is primarily there during the daytime hours. (Tr. 563-566). Ms. Tayao testified that only RNs or LPNs can take instructions from doctors over the telephone. (Tr. 563-564). Ms. Tayao also testified that King David had trouble meeting payroll and paying creditors. (Tr. 569-570). She indicated that she and Ms. Blackwell in human resources monitored the nonimmigrant nurses and that there were four groups of nurses employed under the H1-A program (Tr. 596-607). The nurses would get their raises when they brought in their licenses. (Tr. 607).

Leticia Chang, director of in-service training and education at King David, is in charge of education and training of the nursing staff; until 1989 she was director of nursing. (Tr. 637-638). She described the diagnoses of patients at King David as including HIV-AIDS, demented, psychotic, behavioral problems, diabetes with complications such as renal failure, amputation, and post-stroke with paralysis. (Tr. 639). She also indicated that King David has indigent residents and that the majority of residents are Medicaid residents. (Tr. 639). She also verified that CNAs, GNs, LPNs, and RNs do their particular type of work. (Tr. 647). She testified that Ms. Dwyer met with the nursing department to discuss what the facility could do to free registered nurses from nonnursing duties, which led to the hiring of auxiliary staff responsible for making beds, escorting patients to appointments or on outings, taking charts, assisting residents in "rehab." areas, and assisting in activities. (Tr. 665-666). The auxiliary staff is not assigned to answer the telephone, but anyone who is near a ringing telephone is expected to answer it. (Tr. 666-667).

DISCUSSION

This proceeding arises under a statutory provision that is no longer in effect[11] and relates to a facility that has gone into involuntary bankruptcy and is now defunct. There is also an indication that whatever amount may be awarded in penalties would have little or no significance as the facility's assets are apparently insufficient to cover unsecured debts. Nevertheless, as there is still an active controversy of sorts, and as the impossibility of recovery is not certain, I will resolve the issues before me.

As noted above, the instant case arises under the enforcement provisions of the Immigration and Nationality Act (specifically, the Immigration Nursing Relief Act of 1989), 8 U.S.C. § 1101 ***et seq***. ("the Act"), relating to the employment of nonimmigrant nurses under H-1A visas. The history and purpose of the program is discussed at length in Associate Chief Judge James Guill's Decision and Order in ***Administrator v. International Health Services, Inc.,*** 93-ARN-1 (March 18, 1996), the leading administrative law judge decision relating to the H-1A program. That discussion will not be repeated here.

The regulations define "H-1A nurse" as "any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(a) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(a))."[12] 20 C.F.R. § 655.302. A "nurse" is defined as "a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services." 20 C.F.R. § 655.302.[13] In order to avail of the H-1A program, a

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[11] ***See*** 8 C.F.R. § 214.2(h)(3)(ii)(A), (h)(15)(ii)(A) (regulations of Immigration and Naturalization Service (INS) indicating that the H-1A classification for nurses expired on September 1,1995, except for aliens who obtained an extension of stay until September 30, 1997). ***See also*** Tr. 429-430.

[12] INS regulations define "registered nurse" for purposes of H-1A classification as "a person who is or will be authorized by a State Board of Nursing to engage in registered nurse practice in a state or U.S. territory or possession, and who is or will be practicing at a facility which provides health care services." 8 C.F.R. § 214.2(h)(3)(ii).

[13] In order to qualify under the definition of nurse, the alien must also (1) have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education (unless the alien received nursing education in the U.S. or Canada); (2) have passed the Commission on Graduates for Foreign Nursing Schools examination or have obtained a full and unrestricted (permanent) license to practice as an RN in the state of intended employment (or any other state if the alien has received temporary authorization to practice as an RN in the state of intended employment); and (3) "[b]e fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to

facility must file an attestation with supporting information indicating compliance with the regulatory standards. The facility may then file its H-1A petitions with the Immigration and Naturalization Service (INS) and, upon INS approval, the nurses may practice as registered nurses. ***See*** 20 C.F.R. Part 655 Subpart D (sections 655.300 to 655.350); ***International Health Services, Inc.*** at p. 37.

One of the regulatory requirements is that, in order to meet the required second attestation element (that the employment of the alien will not adversely affect the wages of registered nurses similarly employed), the facility must agree to pay each nurse "at least the prevailing wage for the occupation in the geographic area" and the higher of the prevailing wage and the facility wage. 20 C.F.R. § 655.310(e)(1); ***International Health Services, Inc.*** at pp. 9-10, 38-39. The prevailing wage is to be determined by the State employment security agency (SESA) for similarly employed nurses in the geographic area, and the facility is required to request such wages from the SESA not more than 90 days before submitting the attestation to the Employment and Training Administration (ETA). 20 C.F.R. § 655.310(e)(1)(i). The regulation provides that once a facility has obtained a prevailing wage determination from SESA and filed an attestation supported by it, "the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (both to the occupational classification and wage) and thereafter shall not contest the legitimacy of the prevailing wage determination in an investigation or enforcement action." ***Id.*** The regulations provide a mechanism for a facility to challenge a SESA prevailing wage determination with ETA prior to filing the attestation. ***Id.***

Under the regulations of the Immigration and Naturalization Service (INS), a nurse who is granted H-1A classification and who does not hold a permanent State license must pass the examination for State licensure as a registered nurse within six months from the date of initial admission to the United States in order to maintain H-1A eligibility. 8 C.F.R. § 214.2(h)(3)(v)(B). Under subparagraph (C) of that section:

> (C) A nurse shall automatically lose his or her eligibility for H-1A classification if he or she is no longer performing the duties of a registered professional nurse. Such a nurse is not authorized to remain in employment unless he or she otherwise receives authorization from the Service.

8 C.F.R. § 214.2(h)(3)(v)(C).

The enforcement provisions in the Department of Labor regulations appearing at 20 C.F.R. Part 655 Subpart E (sections 655.400 to 655.460) vest the investigative and

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be employed by the employer." 29 C.F.R. § 655.302. Essentially the same requirements appear in INS regulations, 8 C.F.R. § 214.2(h)(3)(iii). ***See also*** 8 U.S.C. § 1182(m)

enforcement functions of the Secretary of Labor under 8 U.S.C. § 1182(m) in the Administrator, Wage and Hour Division. 20 C.F.R. § 655.400(a). Under section 655.410, the Administrator may assess a civil money penalty not to exceed $1,000 for each affected person with respect to whom there has been a violation and with respect to each instance in which such violation occurred. In addition, the Administrator is required to impose appropriate remedies, including payment of back wages and the performance of attested obligations such as providing training. 20 C.F.R. § 655.410(a). In determining the amount of civil money penalty to be assessed, the Administrator is required to consider the type of violation committed and other relevant factors. [14]

In the instant case, the Administrator, Wage and Hour Division, Employment Standards Administration has assessed penalties against the Respondent based upon King David's alleged misrepresentation of material facts and failure to perform the conditions to which it attested, in view of its failure to pay the required wage rate to both United States and nonimmigrant alien registered nurses and its failure to provide adequate support services to free registered nurses from administrative and other nonnursing duties. The Administrator assessed the following penalties: back wages of $477,145.78[15] owed to 60 U.S. and H-1A nurses and a civil money penalty in the amount of $63,000 ($60,000 of which was based upon the failure to pay the prevailing rate and $3,000 of which was based upon the failure to provide adequate support.) In calculating the back wages, the Administrator deemed each H-1A nurse entitled to the full prevailing wage rate for an RN during the entire time that the nurse was employed by King David, including, for the nurses who initially failed the RN examination, those time periods during which the nurse could not perform RN duties as a result of having failed the RN examination.

There are essentially three arguments that were advanced by the Respondent during the preliminary stages of this litigation with respect to the penalties assessed based upon the failure to pay the prevailing rate. I will discuss these arguments seriatim.

First, Respondent argued that it should not be bound by the SESA prevailing wage determination as it is a nursing home facility and SESA used the higher rate applicable to hospitals for the third and final attestation. While Respondent may well

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[14] Factors to be considered include, but are not limited to: (1) previous history of violation(s) by the facility; (2) the number of workers affected; (3) the gravity of the violation(s); (4) efforts made by the violator in good faith to comply with the attestation or the State plan; (5) the violator's explanation; (6) the violator's commitment to future compliance, taking into account the public health, interest or safety; and (7) the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers. 20 C.F.R. § 655.410(b).

[15] See footnote 10 above and accompanying text.

be correct on the merits of this argument, this is not the appropriate forum to challenge the SESA prevailing wage determinations, which must be contested under 20 C.F.R. Part 658. ***See International Health Services, Inc.*** at p. 10, n. 10 (addressing issue based upon regulations in effect prior to 1994, 55 Fed. Reg. 50511 (Dec. 6, 1990)). If Respondent wished to challenge the SESA determination, it should have done so prior to filing the attestation. While not in effect at the time the attestations were filed, the current regulations specifically so provide. ***See*** 20 C.F.R. § 655.310(e)(1)(i).

Second, Respondent argued that it should not be responsible for paying the full prevailing wage for RNs during the period of time that the nurses were not working as RNs either because they were graduate nurses or (for some of the nurses) because they had failed the RN examination. As noted above, the regulations include in the definition of "nurse" the requirement that the alien nurses "[b]e fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States." 20 C.F.R. § 655.302. Moreover, Judge Guill held, with respect to an alien nurse who worked in an administrative position in which she performed nonnursing duties, that "the terms and conditions of [the nurse's] employment must be in accordance with her H-1A contract which necessarily entails a finding that the wage rates governing her H-1A contract must also apply to time spent performing her duties as Nurse Coordinator." ***See International Health Services, Inc.*** at p. 57. Judge Guill went on to note that the nurses are entitled to the payment of the prevailing wage rate for all time worked. ***Id.***

As employment as a graduate nurse would fall squarely within these provisions, I find no basis for paying graduate nurses at a different rate. Section 655.302 (and its counterpart in the INA regulations) clearly contemplates that nonimmigrant nurses may have to practice on a temporary or interim basis prior to being certified as RNs by the appropriate State entity.

A different situation is presented by the nurses who failed the RN examination and took other positions at King David. How to treat such nurses is essentially an issue of first impression. Although Judge Guill held that the H-1A nurses must be paid as such even when performing nonnursing duties, he did not address the issue of whether the prevailing wage must be paid to nurses who did not qualify as RNs. ***See International Health Services, Inc.*** at p. 57. In this regard, the Administrator admitted that the nurses could have been fired and deported at the time they failed the examination. At that time, they lacked the protection of the program to prevent their deportation and therefore arguably also lacked the benefits of the program. It would also appear to be unfair to require the facility to pay these nurses at a higher rate for work they were not allowed to perform due to their own inability to pass the RN examination. However, all of the nurses but one ultimately qualified as RNs and were so employed by King David, and it is apparently undisputed that when they obtained

their RN licenses, they were covered by the program. The statute and regulations do not appear to allow for a situation in which alien nurses are sometimes covered by the prevailing wage requirements and at other times are not. Moreover, when a statutory scheme is unclear, deference should be given to the agency administering and enforcing the scheme. ***E.g.,*** 2B ***Sutherland Statutory Construction*** ¶ 49.05 (5th ed. 1992). Here, Ms. Dodds testified as to the Department of Labor's position that the nurses should have been paid the prevailing RN rate for the entire time period they worked at the facility. Under these circumstances, I find that when King David chose to continue to employ the H-1A nurses after they failed the examination and to allow them to ultimately qualify, it remained liable to pay them the pertinent prevailing wage rates.

Third, Respondent has argued that application of the mitigating factors in 20 C.F.R. § 655.410(b) mandates that the penalties assessed be reduced.[16] Ms. Dodds testified that application of the factors led to her conclusion that there should be no mitigation because of (1) the nature of the violation (misrepresentation, which is considered the most serious violation); (2) the amount of money the facility obtained due to the failure to pay the prevailing wage (close to half a million dollars); and (3) the large number of nurses involved (sixty). Moreover, King David did not offer any explanation for failing to pay the full prevailing wage it had agreed upon ($15.37) even for those persons who qualified as RNs. On the other hand, mitigating factors suggested by Respondent include (1) the useful function that the facility performed by serving a community of needy persons with limited options; (2) the lack of financial gain, as the money obtained did not enrich the facility, which was barely capable of meeting payroll and expenses, as borne out by its ultimate bankruptcy; and (3) the fact that the nurses who failed the examination could have been fired and deported, so they did not sustain any financial loss. There also is no indication that there were previous violations, other than those included in this action.

Under the totality of circumstances, I find that there are mitigating factors. In this regard, while misrepresentation may be a serious violation, the actual misrepresentations were confined to the attestations by King David that it was paying its RNs $15.37 hourly during a period of time when those RNs received their pay at a lower rate ranging from $14 to $15.35 hourly (for at least part of the time period). King David has offered no justification for these discrepancies. (CX 1-A; CX 1-H, 1-F, 1-D). The remaining deficiencies in payment of the prevailing wage were not related to misrepresentation but were based upon King David's own interpretation of the program requirements and its position that it should only have to pay the RN rate for nurses in RN positions and that the nursing home rate (previously calculated as $15.37 hourly) should apply to it for the entire period. Although I disagree with King David's interpretation, as set forth above, I do not question that it was made in good faith. Moreover, the facility was not enriched in any way by the misrepresentations and was

[16] See footnote 14 above.

merely enabled to stay open for a longer period of time, which was to the advantage of the domestic work force as well as to the H-1A nurses and to the community in general. Under these circumstances, I find that the penalty assessed for each prevailing wage rate violation should be reduced by fifty percent to $500, which would amount to $30,000.00 for the sixty nurses involved. ***See International Health Services, Inc.*** at p. 78-80 (affirming $500 per employee penalty for violation of prevailing wage requirements.)

Turning to the second violation complained of -- failure to obtain adequate support -- I will reverse the Administrator's determination. In this regard, in its attestations, King David check the boxes on the form indicating that one of the steps it was taking to decrease its dependence on nonimmigrant nurses was "[p]roviding adequate support services to free registered nurses from administrative and other nonnursing duties." (CX 1-C, 1-E, and 1-G; CX 7). The regulatory provision relating to this attestation, which was the same in the version of the regulations in effect at the time the attestations were made, provides, in pertinent part:

> Non-nursing duties include such activities as housekeeping duties; food preparation and delivery; transporting patients; providing occupational and respiratory therapy; answering telephones; running errands for patients; and clerical tasks. A facility choosing this step shall not require nurses at the facility to perform non-nursing duties. However, it is understood that on an infrequent non-recurring basis, nurses at the facility may perform one or more of the tasks encompassed by the duties list above . . . or other non-nursing duties. . . .

20 C.F.R. § 655.310(g)(4).

In each of Ms. Dwyer's supporting declarations, she indicates the following in support for that item:

> Registered nurses receive adequate support services, i.e., the housekeeping department does the housekeeping and cleaning. Nurses aides feed and bathe patients and run errands for patients.

(CX 1-H, 1-F, 1-D). The evidence of record is consistent with Ms. Dwyer's declarations, and witnesses testified that the housekeeping staff was primarily responsible for housekeeping and CNAs were primarily responsible for patients' personal care. Further, Ms. Dwyer met with the nursing department to see what other steps could be taken, which more recently led to the hiring of auxiliary staff. The record does not show that King David failed to make an effort to relieve RNs from non-nursing duties by providing adequate support services, as it attested it would. All it shows is that RNs performed some administrative and non-nursing duties, while such duties were also performed by GNs, CNAs and housekeepers. While the language in the regulation

quoted above does appear to prohibit non-nursing duties from being performed on a frequent or regular basis, I do not find the type and frequency of non-nursing duties performed here to be sufficient to establish a misrepresentation by the facility in its attestation. Further, there is no indication of bad faith. Thus, the Administrator has failed to demonstrate that a violation of this attestation occurred and I will reverse the Administrator's determination on the issue of failure to provide adequate support.

ORDER

IT IS HEREBY ORDERED that the Administrator's Determination is **AFFIRMED AS MODIFIED** with respect to the prevailing wage issue and **REVERSED** with respect to the adequate support issue, and

IT IS FURTHER ORDERED that Respondent shall pay back wages owed as determined by the Administrator, which has been calculated as $477,145.78, and shall pay to the Administrator, Wage and Hour Division, Civil Monetary Penalties in the amount of $ 30,000.00.

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE: In accordance with Departmental regulations, the Administrator or any interested party desiring review of this Decision and Order may petition for such review by the Secretary, in accordance with the procedure set forth in 20 C.F.R. § 655.445 (formerly also appearing in 29 C.F.R. § 504.445). A petition for review must be timely filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. ***See*** Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996); Final Rule, 61 Fed. Reg. 19982 (May 3, 1996) (delegating enforcement functions of Secretary under pertinent statute and regulations to Administrative Review Board.) To be timely filed, a petition for review must be filed **within thirty (30) days** of the date of this Decision and Order. ***See*** 20 C.F.R. § 655.445.